

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19**

AUTO WAREHOUSING CO.

Employer-Petitioner

and

Case 36-UC-270

TEAMSTER DAIRY, BAKERY & FOOD
PROCESSORS, INDUSTRIAL, TECHNICAL
& AUTOMOTIVE LOCAL UNION NO. 305,
affiliated with INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, AFL-CIO

Union

ORDER CLARIFYING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The Union is a labor organization within the meaning of the Act.

By this petition, the Employer ("AWC") seeks to have an established unit ("Unit") clarified to exclude a new grouping of six employees ("Ford employees"). The Employer contends that the Ford employees should be excluded unless and until the Union is certified to represent them. The Union contends that the Unit should be clarified to include these same employees because they constitute an accretion to the Unit.

¹ Briefs have been received from both parties and duly considered.

Facts

The Employer is engaged in the business of loading and unloading new automobiles for trans-shipment at railheads and ports, and in the performance of various operations on such vehicles, at numerous locations in the United States, including Portland, Oregon, the only operation involved in this proceeding. Its customers can include the auto manufacturers or the enterprises that physically transport the vehicles, such as a railroad.

The Portland enterprise currently consists of the Hyundai, the Honda and the Ford operations. (The term "Ford" as used herein will refer only to the Ford railhead contract that began in January 1997, and does not include the Autostack operation (infra) which also involved Fords.) The Employer has operated in the Portland area since September 1995, when it took over from Port Services Co. ("PSC"). PSC's employees were represented by the Union or its predecessor in an "all employee" unit. At the time of takeover, the Employer acquired, in relevant part, PSC's Honda and Hyundai operations, as well as the Autostack operation, and recognized the Union. The Employer was awarded the Ford contract in late 1996 and began that work about January, 1997. Up until that time, the Ford contract had been held by Rampmaster, a non-union employer.²

There were preliminary discussions between the parties about a possible addendum to the 1994-1997 labor agreement, to cover the Ford employees if and when the operation began. The Union suggested some possible wage rollbacks and other changes specifically for that operation and the Employer apparently bid accordingly, without any specific acceptance or further discussion. Once the contract was awarded, the Union claimed that what the Employer had apparently viewed as a firm (albeit unaccepted) offer was just a "talking paper." Both sides have avoided claiming herein that there was any recognition by virtue of these interchanges. I accept their position.

Once the Ford contract began, the Union made a demand to have the Ford employees accreted to the Unit. The Employer declined. The Union took the matter to arbitration,³ where it prevailed. The Employer declined to comply with the decision, and filed its petition after the matter was not resolved during the negotiations for the new 1997-00 agreement.⁴

The Honda and Hyundai facilities are characterized by the Employer as "port" operations, i.e., a linkage between marine transport, and land transport by truck or rail. The Ford operation involves the linkage between rail and truck transportation and is characterized as a "rail" operation. Nevertheless, both terminals operate under the corporate Director of Rail Operations. The Honda and Hyundai operations together are referred to in the record as the "marine side."

Hyundai automobiles are imported into the US aboard a specialized ship, then off-loaded by ILWU-represented employees, who "drop" the vehicles at the first place of rest. The vehicles are then moved by Unit employees about what is essentially a large parking lot, where the autos are briefly stored for additional processing. While the Hyundais are at this facility, various operations, generally referred to

² There were other vehicles processed during this timeframe, but either they no longer are, or their numbers were small and/or didn't really vary from the major operations.

³ It is obvious that I cannot defer to that resolution, since the Board has a policy of non-deferral concerning accretion matters. Moreover, the arbitrator specifically declined to consider any Board precedent, instead relying only on the contract and past practice.

⁴ The petition was timely filed. The current dispute arose during the life of the 94-97 agreement. The parties negotiated a new agreement, but reserved the instant dispute for alternative resolution.

as “accessorizing,” are performed on the vehicles, such as the addition of air conditioning, radio, mud flaps or other options. Eventually they are staged at specific loading spots, for loading onto auto carrier trucks (by carrier employees), or driven by Unit employees onto specialized rail cars, for transport by the Burlington Northern Santa Fe Railroad (“BNSF”). The cars⁵ are accessed by a portable ramp at the end of a string of such cars. Each car in the string is connected to the next by two plates. The autos are driven up the ramp through the chain of cars, then secured for shipment. At this point, the Employer’s work is completed. The cars are moved into and out of the yard by the railroad. All of this work is performed at a facility (“Hyundai facility”) about one-half mile from the Employer’s main Portland facility/offices.

Honda operations are conducted at a site adjacent to the Employer’s offices (“Honda Facility”). The work is largely the same as with Hyundai, except that only minimal processing is performed on the vehicles (i.e., park and load). In addition, some Hondas manufactured in this country are exported by ship after arrival on cars from their US manufacturing plant and unloading by the Unit. This basically follows the above-described process, in reverse.

Ford operations are conducted “across the street” and about one quarter of a mile down the road from the Honda Facility, on property under BNSF’s control. The railroad spots the cars on a siding. From there, the rail cars are moved into unloading position by the Employer’s employees, using a miniature locomotive called a “mule” or “Trackmobile.” Vehicles are then offloaded (from the same kind of cars used in the Honda and Hyundai operations), then parked in assigned spots,⁶ at which time the Employer’s involvement is complete.⁷ Other enterprises then load and ship the autos via truck to Northwest locations. Neither accessorizing nor export is normally involved.

The “Autostack operation,” whether operated by PSC or the Employer, was also conducted “across the street” on the BNSF property, at a location physically adjacent to or near the Ford facility. The location was determined by Autostack, and/or the railroad, one of which owned the equipment and established the site of the fixed equipment. Under the Autostack operation, autos were shipped from the US factory on “racks” in specialized containers placed aboard “piggyback” rail cars, to Portland. The containers were trucked from a rail yard in Portland by independent truckers to the Autostack “plant.” Unit employees hosted the containers, which were on wheels, to the Autostack unloader apparatus, where the “racks” which held the autos within the containers were removed and the autos therein somehow unloaded and placed on the ground, then driven to parking bays. The racks were then broken down in preparation for the backhaul, at which time the Employer’s involvement was complete. It appears that the unloaded autos (Fords) were placed in a common lot established by the railroad, along with the Fords unloaded at the Rampmaster/Employer Ford railhead. (I will assume so, but my decision would be the same in either case.)

The Employer’s Chief Operating Officer is John D. Rogers, Jr., who is stationed at corporate headquarters (somewhere other than Portland). Reporting to him is, inter alia, the corporate Director of Rail Operations, Don Joslin, also at headquarters. Under Joslin are the various rail terminal managers. Until the Ford railhead contract began, the entire Portland operation - Hyundai, Honda and Autostack - reported through Operations Managers to the Portland Terminal Manager, who reported to the Director of

⁵ The term “cars” as used herein will refer only to drive on/drive off rail cars. The term “auto” or “automobile” will refer to the motor vehicles processed by the Employer.

⁶ The Ford, Hyundai and Honda lots mentioned herein are each separated, dedicated lots.

⁷ The same cars that brought Fords to Portland might be moved over to Honda or Hyundai for transport of US-bound autos; that would be the railroad’s independent decision, carried out by it.

Rail Operations. When the Ford contract was added, it was supervised for about one and one-half years by an Operations Supervisor reporting to the Portland Terminal Manager. In July 1998, a separate Terminal Manager for the Ford work was established, reporting to the Director of Rail Operations, in effect making Ford a separate "terminal"; at the same time, the Operations Supervisor position for Ford was eliminated and a Lead/Foreman position established, reporting to the Ford Terminal Manager. There were a number of other supervisory gyrations and replacements during this time frame, but this was the supervisory structure as of the filing of the petition and the close of the hearing.

Three of the initial Ford employees were brought over from Rampmaster; all subsequent hires have been through an employment agency different from the one used for the marine side. There are two separate, distinct workforces: the marine side, consisting of the combined Honda and Hyundai workforces; and the Ford side. There is no interchange or transfer between the two groups. The marine side works a basic Monday through Friday, 8-hour workday, while the Ford side works seven days per week, with a varying schedule depending on the number of cars presented for unloading.

There is virtually no integration of work between the two workforces. The Ford employees perform all, and only, the Ford functions; the marine side performs all and only Hyundai/Honda functions, using a single pool of employees. There are only minimal exceptions: the limited gasoline (but not Diesel fuel) needed for Ford-side operations is obtained from the marine side by Ford employees using gas cans;⁸ maintenance on mobile equipment and on buildings on the Ford site⁹ is performed by marine-side mechanics, if within their expertise, but it amounts to perhaps 5% of their work; when a Ford is damaged it will be repaired by the marine-side mechanics. (The record does not reflect how frequently this Ford repair occurs, but it appears to be a minimal amount of work).

The Ford side has its own office on the Ford site from which its own basic paperwork is generated.¹⁰ It uses the BNSF computer system to track the Fords, while the marine side uses an AWC system. The record does not reflect any shared phone system. The Ford side managership, whatever denominated and held by whomever, has exclusive responsibility for day-to-day operation of that facility, setting hours, making work schedules, granting time off, receiving sick calls, granting vacations and deciding on overtime. That manager also frequently effectively recommends hiring. The same is true for the marine-side Operations Managers, except that they seem to have no role in hiring.

There is a common Human Resource person located in the Portland main office who serves all Portland operations. She is a resource for the operations overall, and must be consulted for any major discipline, such as suspension or discharge. She either hires or passes on hiring recommendations from the on-site managers familiar with the work of temporary employees under consideration for regular employment. Applicants for permanent positions fill out a common application, and can be considered for either side. The record does not reflect any person ever having been hired as a temporary on one side, and then offered permanent employment on the other side.

⁸ The autos generally do not need to be re-fueled following arrival.

⁹ These items are railroad property, but are used by the Employer. The railroad is responsible for maintenance, but compensates the Employer for same.

¹⁰ There is some general testimony that the main office, on the marine side, is a "shared" office, but no specifics were given. It definitely does not appear that the first level supervisors for any of the operations work out of the main office, as opposed to working directly at the worksite.

Between the initiation of the Ford work in January 1997 and the closing out of the Autostack operation in February 1998, there was some additional overlapping or integration. There was some sharing of a “wand” between the Ford railhead and Autostack operations. (The wand is a device used to read identifying bar codes on the individual autos.) There was also another kind of shared wand used to punch in and out. These devices were railroad property and used at the railroad’s direction.¹¹ Some paperwork concerning the Autostack-ed vehicles (“tickets” pre-designating the parking bay for each vehicle) was picked up by Autostack Unit employees in the Ford railhead building, where the railroad had installed its computer and printer used for that function.¹² (It is unclear if everything in this paragraph was also true when PSC operated the Autostacker.)

Likewise, during this same time frame, supervisory vacancies in the nascent Ford operation were filled by individuals with ties to the marine side. Karen Simmons was the original Operations Supervisor for the Ford railhead; prior to that she supervised the Autostacker. She soon left the Employer and was replaced by Glenda Quinn, who came from the marine side. Quinn was in training for the Ford position temporarily while still working on the marine side. After 10 months, Quinn returned to the marine side, when responsibility for the Ford railhead was shifted to the new position of Terminal Manager, held first by Mike Mast and then John Studder. When Simmons moved over to Ford operations, Duane Werbowski, as an Operations Manager on the marine side, took over Autostack until that operation closed out in February 1998. Thus, it is clear that there has been almost no overlap in supervision, and none for employees, since the initiation of the Ford contract.

Under PSC, whenever a new operation was initiated, the Union was always recognized, apparently without any showing of interest. The Ford operation is the first new contract undertaken by the Employer since it took over PSC. The Union has not presented a demonstration of majority support among the Ford employees to the Employer; instead, it has sought recognition only as an accretion to the Unit.

¹¹ The Union implied that Ford railhead employees sometimes helped in the Autostack operation when work was backed up. However, it was explained that in the cited circumstances, the Unit Autostack employees would drop the cars off very close to the Autostacker (instead of parking them out in the lot), so that employees of another enterprise (Terminal Services) could pick up the cars on the spot. This method would skip the intervening step of moving autos onto the lot, giving the Terminal Services employees access to the autos more expeditiously. No Ford railhead employees were involved.

¹² Recall that the vehicles handled at the railhead and at the Autostacker were all Fords, handled under (separate) contracts with BNSF.

Analysis

The Union's key argument at hearing and on brief is that the "employer" has always recognized the Union every time a new operation was initiated, either because that was the past practice or because the contractual language required same.¹³ This argument is essentially a red herring. The issue is not what the contract says about granting recognition for future work or what the past practice might be. Even if the contract had said in the starkest of terms that if and when the Ford contract were secured, the Employer agreed to recognize the Union for such operation, this would not be definitive, or even relevant to this dispute. The issue is accretion: if there is an accretion, then by operation of law, with or without benefit of contract language, the Union represents the employees; on the other hand, if there is no accretion, then, by operation of law, the Union does not represent the new employees, regardless of what the contract says, or past practice.¹⁴ To do otherwise would be to violate Section 8(a)(2). The parties' language or intent does not control the outcome.

Accretion, insofar as involved herein, concerns whether a new group of employees is automatically represented by the Union, or whether there must be an election first. The Board follows a restrictive policy in finding accretion, because accretion forecloses the basic statutory right of employees to select their bargaining representative. The Board will find a valid accretion only when the new group of employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit *and* when the additional employees share an *overwhelming* community of interest with the pre-existing unit to which they are accreted. *Safeway Stores, Inc.*, 256 NLRB 918 (1981); *Compact Video Services, Inc.*, 284 NLRB 117 (1987); *Honeywell, Inc.*, 307 NLRB 278 (1992).¹⁵ Otherwise, a self-determination election is the proper method by which a union may add unrepresented employees to the contractual unit." *Warner-Lambert Company*, 298 NLRB 993, 995 (1990).

The time to examine the accretion issue is as of the time of the hearing, not a year earlier when facts might have been different. In this regard, while there has been testimony about how the enterprise operated during the first year of the Ford operation, testimony which shows *some* past overlap in supervision, I must examine the facts as they existed at the hearing, not how they used to be.

The *Safeway* accretion standard requires that, for there to be an accretion, the new group of employees be unable to stand as an appropriate unit, *and* that they share an "overwhelming community of interest" with the unit; otherwise, there must be a voluntary, not an imposed, selection of representative. Both of these factors involve the question of degree of community of interest. The Board has identified two such criteria as being particularly significant in analyzing accretion: the degree of actual interchange of employees between the two groups, and common day-to-day supervision. *Gitano Group, Inc.*, 308 NLRB 1172 (1992); *Towne Ford Sales*, 270 NLRB 311 (1984); *Compact Video Services, Inc.*, *supra*.

¹³ Actually this assertion refers only to PSC; AWC never had occasion to decide whether to recognize the Union at a new operation until the Ford contract.

¹⁴ The only relevance of past practice or contract language might be regarding application of the contract language to the employees, *if* there were an accretion; or whether the Employer would be obligated to recognize the Union and apply the contract *upon demonstration of majority support* by the Union, ("Kroger clause"), if there were no accretion.

¹⁵ The Board, post-*Safeway*, sometimes used language implying that accretion could take place as long as there was some community of interest, but less than an overwhelming one. However, it appears that the *Safeway* standard is now the operative requirement.

In the instant case, there is *no* interchange, or transfer between the two groups of employees. In addition, there is *no* common supervision below the corporate level, except for the limited rule of the Human Resources representative, stationed at the Portland office. Beyond that, the work is very similar: same rail cars, similar automobiles, largely similar equipment, very similar procedures. Nevertheless, there are some important differences: the Ford operation is a seven-day per week, operation with an open-ended schedule, while the marine side is largely a 40-hour, five-day schedule; the Ford employees move train cars, operating the mule,¹⁶ while the marine side does not; the marine side performs regular and substantial accessorization, albeit not on all vehicles, while the Ford side performs none. There are somewhat different benefits between the Unit's contractual benefits and the Employer's own benefits granted to non-unit employees. Finally, there is minimal integration of operations.

Applying all of the foregoing facts to the *Safeway* principles, it seems clear that the Ford employees could constitute *an* appropriate unit, thereby failing to meet the first of the two *Safeway* accretion requirements. At a minimum, while there is obviously some community of interest between the two groups,¹⁷ it is not "substantial" within the meaning of *Safeway*, something that becomes clear when the two primary elements of accretion are examined: common supervision, interchange. Thus, the second requirement for accretion is not met either. To accrete the Ford employees on the basis of past practice or contract language would violate the Act.

This case raises a question concerning representation which must be resolved by an election if at all.¹⁸ Accordingly, I hereby clarify the unit to exclude the Ford employees.¹⁹

¹⁶ The record indicates that manufacturer certification of the operator will be required, but no one had yet been certified as of the hearing. It is obvious that error in the operation of the mule would have potentially lethal results. Training extends over the course of about 60 days.

¹⁷ After all, they all move automobiles.

¹⁸ The Union argues that the Ford group could not stand as an appropriate unit. I have found that it could; but, even if I were in error, it could still stand as an appropriate voting *group* for purposes of a *Globe* election.

¹⁹ This action does not constitute a certification or re-certification of the Union.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 - 14th Street, N.W., Washington, D.C. 20570. This request must be received by the Board in Washington, D.C. by February 23, 1999.

DATED at Seattle, Washington, this 9th day of February, 1999.

/s/ PAUL EGGERT

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